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No. 84-887

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE STATE OF CONNECTICUT,
Petitioner

v.

DONALD COUTURE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Connecticut

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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On December 18, 1984, the Connecticut Supreme Court issued "replacement" pages for its decision in State of Connecticut v. Donald Couture. See Supp. App. A. These "replacement" pages come more than two and one half months after the Connecticut court issued its decision and

also after the State of Connecticut has filed its petition for a writ of certiorari with this Court. Pursuant to Supreme Court Rule 22.6, the State of Connecticut now files the following supplement to its petition.

STATEMENT OF THE CASE

As detailed in the State's petition for a writ of certiorari, the respondent Donald Couture claimed before the Connecticut Supreme Court that the prosecutor's summation remarks had deprived him of his fourteenth amendment right to due process of law. On October 2, 1984, in a 4-1 decision, the Connecticut Supreme Court reversed Couture's murder convictions and ordered a new trial. The Connecticut court concluded that although the record

permitted no serious doubt of guilt, the prosecutor's remarks had deprived the defendant of his due process right to a fair trial. Petition for Writ of Certiorari at 15-16. The concluding paragraph of the Connecticut Supreme Court's decision on this issue ended with the following sentence:

> The trial court erred not only in overruling the defendant's objections to the prosecutor's improper remarks but also in denying the defendant's motion for a new trial.

State v. Couture, 194 Conn. 530, 566-65, 482 A.2d 300, 319 (1984) (App. A at 36a).

On November 29, 1984, the State of Connecticut filed a petition for writ of certiorari with this Court. On December 18, 1984, the Connecticut Supreme Court issued "replacement" pages for its decision in State v. Couture. See Supp. App. A. The concluding sentence of the majority's opinion on the final argument

issue was amended to read:

> Because the prosecutor's remarks denied the defendant a fair trial in violation of both the federal and state constitutions, the trial court erred not only in overruling the defendant's objections to the prosecutor's improper remarks but also in denying the defendant's motion for a new trial.

194 Conn. at 565 (replacement page)(Supp. App. A at 1a)(emphasis represents new language).

This amendment to the majority's opinion compelled Justice Healey to issue an addendum to his dissent. Justice Healey wrote:

> I am now constrained, on December 18, 1984 to write the following addendum to my dissenting opinion, originally released on October 2, 1984, because I note that the amendment now made to the majority opinion, at page 565, inserts the language: "Because the prosecutor's remarks denied the defendant a fair trial in violation of both the federal and state constitution."
>
> Without analyzing whether the apparent ambiguity of the exact basis of the majority's disposition of this issue is augmented by this amendment, I readily admit that I,

like the majority, overlooked one significant matter in originally writing my dissent. I refer to the ground of the defendant's claim as stated in his brief on the issue of the prosecutor's summation. His appellate brief, at pages ii and 32, frames this claim as follows: "The prosecutor's improper and inflammatory summation deprived the appellant of his fourteenth amendment right to due process of law." There is nothing ambiguous about this claim as stated; it is specifically made, not under the Connecticut constitution, but rather under the United States constitution. Moreover, the defendant's brief on this issue does not disclose a single reference to our state constitution. The state's appellate brief on the summation issue, which argues that the prosecutor's summation was proper, responds to the defendant's due process claim that was asserted under the fourteenth amendment of the federal constitution.

We have often said that a claim of error not briefed is considered to have been abandoned. See, e.g., State v. Perez, 183 Conn. 225, 228 n.3, 439 A.2d 305 (1981); State v. Ruiz, 171 Conn. 264, 265, 368 A.2d 222 (1976). We have pointed out that where a violation of the fourteenth amendment to the United States constitution was not claimed in the appellant's preliminary statement of issues, in addition to not being briefed, that claim was not part of the appeal. Bencivenga v. Milford, 183 Conn. 168, 176 n.10,

438 A.2d 1174 (1981). This court has also determined that "[a]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court . . .[and] [t]his also applies to constitutional claims." (Citations omitted.) Rodriguez v. Mallory Battery Co., 188 Conn. 145, 149, 448 A.2d 829 (1982). Several months ago we invoked this well established practice in refusing to review an appellant's due process claim made under the Connecticut constitution. Hayes v. Smith, 194 Conn. 52, 66, 480 A.2d 425 (1984). None of these circumstances even approaches this suggested "claim" under the Connecticut constitution in this case for the simple reason no such "claim" has been made, briefed, or argued before us. It is only now, some time after the decision in this case was released on October 2, 1984, that the majority is "amending" its opinion apparently to place its resolution of the summation issue on both federal and state constitutional grounds. As already pointed out, the state constitutional ground has never even been presented to this court.

There can be no question about a state court's independent responsibility for its state constitutional law. Recently the United States Supreme Court reiterated: "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."

> Michigan v. Long, U.S. , 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983), quoting Minnesota v. National Tea Co., 309 U.S. 551, 557, 60 S.Ct. 676, 84 L. Ed. 920 (1940). The statement that independent interpretation of state constitutional provisions is now well established does not require citation of authority. On the other hand, the determination by the majority that our state constitution has been violated without any such claim having been made not only subserves our well established appellate practice, but also in this case impermissibly exceeds any recognized right of independent interpretation of our state constitution.

194 Conn. at 572A-572B n.2 (replacement pages)(Supp. App. A at 5a-6a).

ARGUMENT

The Decision of the Connecticut Supreme Court Does Not Clearly and Expressly Rest on Bona Fide, Independent and Adequate State Grounds.

The State of Connecticut maintains that the decision of the Connecticut Supreme

Court is not predicated on bona fide, independent and adequate state grounds. This issue is specifically addressed by the State in its petition for a writ of certiorari at pages 17-18, note 1. Despite the nineteen new words in the Connecticut court's opinion, the decision continues to rest primarily on and remains interwoven with federal law.[1] In reversing, the Connecticut Supreme Court made repeated reference to decisions of this Court and expressly held that the

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[1]The language now inserted renders a single sentence in the Connecticut court's opinion strikingly similar to a sentence of the Michigan Supreme Court in Michigan v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982). In Michigan v. Long, the Michigan Supreme Court wrote: "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, §11 of the Michigan Constitution." 320 N.W.2d at 870. The Michigan Court's reference to its state constitution did not preclude this Court's review of the fourth amendment issue. See Michigan v. Long, - U.S. - , 103 S.Ct. 3469 (1983).

prosecutor's remarks had denied the defendant a fair trial in violation of the federal constitution. There is no plain statement in the Connecticut Court's opinion that "the federal cases [cited were] being used only for the purpose of guidance, and [did] not themselves compel the result that the court ...reached." Michigan v. Long, - U.S. - , 103 S.Ct. 3469, 3476 (1983).[2] There is no plain statement on the face of the opinion that the state due process clause afforded the defendant greater protection than its federal counterpart. In fact, state law standards for analyzing the due process implications of prosecutorial misconduct

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[2]Even several of the state cases cited by the Connecticut Supreme Court involved the application of federal constitutional standards. See, e.g., State v. Binet, 192 Conn. 618, 473 A.2d 1200 (1984); State v. Cosgrove, 186 Conn. 476, 442 A.2d 1320 (1982).

are identical to those imposed under the fourteenth amendment. See, e.g., State v. Glenn, 194 Conn. 483, 491-97, 481 A.2d 741, 745-49 (1984)(prosecutor's comments must be viewed in context of entire trial); State v. Binet, 192 Conn. 618, 627-28, 473 A.2d 1200, 1205-06 (1984)(defendant's burden to show prejudice in light of entire proceeding); State v. Carr, 172 Conn. 458, 471, 374 A.2d 1107, 1114 (1977)(overwhelming evidence of guilt renders any error harmless); State v. Benton, 161 Conn. 404, 412-13, 288 A.2d 411, 415 (1971)(remarks must be shown to have affected the verdict).

In Michigan v. Long, this Court held that it would not undertake to review a state court decision which "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds."

- U.S. - , 103 S.Ct. at 3476 (emphasis added). The factual circumstances surrounding the decision of the Connecticut Supreme Court in this case raise a serious doubt as to whether any state ground basis of the decision is bona fide. First, on appeal to the Connecticut Supreme Court, the defendant never even invoked any state constitutional protections. The claim to be resolved by the Connecticut Supreme Court was one specifically and solely made under the United States Constitution. See 28 U.S.C. §1257(3). Second, in its belated attempt to place its resolution of the summation issue on state as well as federal constitutional grounds, the Connecticut Supreme Court had to completely abandon its own well-established principles of appellate review. See 194 Conn. at 572B n.2 (replacement page)(Healey, J., dissent)(Supp.App. A at 6a). Third, the

"and state constitution" language appears in the Connecticut Supreme Court's decision months after the decision was released and only after the State of Connecticut filed its petition for a writ of certiorari with this Court.

The doctrine of "independent and adequate state grounds" was developed, in part, out of respect for the independence of state courts. See Michigan v. Long, - U.S. - , 103 S.Ct. at 3475. It is not a doctrine, however, to be manipulated by state courts seeking to insulate their decisions on federal questions from this Court's review. The State of Connecticut submits that a bona fide application of the doctrine in this case does not preclude this Court's review of what is clearly an erroneous decision by the Connecticut Supreme Court.

CONCLUSION

For the reasons set forth in its petition and supplement, the State of Connecticut asks that this Court grant its petition for a writ of certiorari or, in the alternative, summarily reverse the decision of the Connecticut Supreme Court.

RESPECTFULLY SUBMITTED,
THE STATE OF CONNECTICUT-PETITIONER

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he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment." Because the prosecutor's remarks denied the defendant a fair trial in violation of both the federal and state constitutions, the trial court erred not only in overruling the defendant's objections to the prosecutor's improper remarks but also in denying the defendant's motion for a new trial.

V

CONSECUTIVE SENTENCES—FELONY MURDER

The defendant was convicted of both the intentional and the felony murder of Leslie Clark and of the felony murder of Edward Cody and William West. He received separate sentences for the murder of each guard, the term (twenty-five years to life) of each sentence to be served consecutively. The defendant challenges the legality of these consecutive sentences both as a matter of statutory construction and as a violation of the double jeopardy clause of the fifth amendment to the United States constitution. We do not agree with the defendant's position in either respect.

Felony murder is a crime against the person. General Statutes § 53a-54c, which proscribes felony murder, provides in pertinent part: "A person is guilty of murder when, acting either alone or with one or more persons, he commits . . . robbery . . . and, in the course of and in furtherance of such crime . . . he, or another participant . . . causes the death of a person other than one of the participants . . . ." Death caused in the course of and in furtherance of the underlying felony is an essential element of the crime of felony murder. *State v. MacFarlane,* 188 Conn. 542, 550, 450 A.2d 374 (1982); *State v. Morin,* 180 Conn. 599, 605, 430 A.2d 1297 (1980).

The statute refers to the death of "a person" in the singular. A fundamental purpose of the criminal law is

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to protect individual citizens from the criminal conduct of another. People are neither fungible nor amorphous. Where crimes against persons are involved, a separate interest of society has been invaded for each violation. Therefore when two or more persons are the victims of a single episode there are as many offenses as there are victims. *State v. Gunter,* 132 Ariz. 64, 70, 643 P.2d 1034 (1982); *State v. Irvin,* 603 S.W.2d 121 (Tenn. 1980); *Vigil v. State,* 563 P.2d 1344, 1351 (Wyo. 1977). As the Wyoming Court so aptly stated in *Vigil,* (at p. 1351): "It must be noted that 'any human being' is in the singular and there is no indication that the defendant can get a bargain rate if he assaults a group of human beings."

There are no double jeopardy obstacles to our construction of the felony murder statute. The double jeopardy clause of the United States constitution protects against multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983). It does not prevent either multiple convictions or multiple punishment for multiple offenses. *State v. James,* 631 P.2d 854, 855-56 (Utah 1981).

There is error, the judgment is set aside and a new trial is ordered.

In this opinion PETERS, GRILLO and MENT, Js., concurred.

ARTHUR H. HEALEY, J., dissenting. I agree with the majority except for their resolution of the defendant's claim concerning the prosecutor's summation. At the outset, it must be made clear that I consider the prose-

tized" the jury into a fixed position against the defendant leaving it unable to render a true verdict on the law and the evidence in keeping with the juror's oath. Reasonably viewed, even the human and practical limitations of the jury system does not justify the majority's cautious silence that this jury just could not and did not follow the trial court's instructions and decide this case solely on the law and the evidence. In *Mapp v. Ohio*, 367 U.S. 643, 657, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), the United States Supreme Court said that "[t]here is no war between the Constitution and common sense." I have grave concerns when I place that statement alongside the majority's view that this judgment must be set aside and a new trial ordered. It must not be overlooked that this case was not a "thin case" such as that in *State v. Binet*, 192 Conn. 618, 473 A.2d 1200 (1984). This case was one where the jury was presented with overwhelming evidence of guilt. While this does not and should not, in and of itself, operate to erase the impropriety of the prosecutor's remarks, it does "defy reality" for the majority aggressively to dilute the significance of that factor in assessing whether those remarks were so prejudicial that the defendant was denied a fair trial in the light of the entire proceeding.

The question then comes down to this: In this case of overwhelming evidence of guilt did the prosecutor's improper remarks cause substantial prejudice to the defendant so as to deprive him of his constitutional right to a fair trial?

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); see *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Cosgrove*, 186 Conn. 476, 488-89, 442 A.2d 1320 (1982).

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The aim of due process "'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Smith v. Phillips*, supra, 219, quoting *Brady v. Maryland*, supra. "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba v. People of the State of California*, 314 U.S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166 (1941), reh. denied, 315 U.S. 826, 62 S. Ct. 620, 85 L. Ed. 122 (1942).

The prosecutor's remarks, as already pointed out, were not in defiance of the trial court's rulings. The trial court's instructions to the jury concerning the prosecutor's argument, although not given immediately, were forceful and clear.[1] The record provides no basis and the majority offers no reasoning which could demonstrate that the jury could not and did not follow these instructions. Moreover, the prosecutor's remarks at issue are the only prosecutorial misconduct complained of during this long trial. Significantly, the state's case against the defendant was so overwhelming that the jury in all probability would have returned a verdict of guilty on the law and the evidence even if the prosecutor had not made his improper remarks. It seems to me that it is proper to ask what effect the improper remarks had or may reasonably be taken to have had upon the jury and its decision; that is the effect on the minds of twelve other people, not ours, viewed in light

[1] At the conclusion of the charge, before the exceptions were taken, the trial court told the jury, inter alia: "Let me explain about exceptions. Counsel, all of them, have been most cooperative, and we have been over the charge together at length ahead of time so that many of what might have now been taken as objections or exceptions to my charge have been ironed out. And,

of the entire trial and not in isolation. Even weighing how others might react, we still cannot weigh our appellate reaction without at least conceding, absent some definite contrary indication, that this jury was capable of acting reasonably. I believe they were so capable. I must therefore conclude that this record does not demonstrate that prejudice which would enable me to conclude that this defendant was deprived of his constitutional right to a fair trial under either the United States or Connecticut[2]

I have accepted his, or his, or his recommendation. . . . So, we sat down together and went over all of this." Thereafter, the jury was excused and the exceptions taken.

[2] I am now constrained, on December 18, 1984, to write the following addendum to my dissenting opinion, originally released on October 2, 1984, because I note that the amendment now made to the majority opinion, at page 565, inserts the language: "Because the prosecutor's remarks denied the defendant a fair trial in violation of both the federal and state constitution."

Without analyzing whether the apparent ambiguity of the exact basis of the majority's disposition of this issue is augmented by this amendment, I readily admit that I, like the majority, overlooked one significant matter in originally writing my dissent. I refer to the ground of the defendant's claim as stated in his brief on the issue of the prosecutor's summation. His appellate brief, at pages ii and 32, frames this claim as follows: "The prosecutor's improper and inflammatory summation deprived the appellant of his fourteenth amendment right to due process of law." There is nothing ambiguous about this claim as stated; it is specifically made, not under the Connecticut constitution, but rather under the United States constitution. Moreover, the defendant's brief on this issue does not disclose a single reference to our state constitution. The state's appellate brief on the summation issue, which argues that the prosecutor's summation was proper, responds to the defendant's due process claim that was asserted under the fourteenth amendment of the federal constitution.

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constitutions. I would find no error on this appeal.

Accordingly, I dissent.

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statement of issues, in addition to not being briefed, that claim was not part of the appeal. *Bencivenga v. Milford*, 183 Conn. 168, 176 n. 10, 438 A.2d 1174 (1981). This court has also determined that "[a]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court . . . [and] [t]his also applies to constitutional claims." (Citations omitted.) *Rodriguez v. Mallory Battery Co.*, 188 Conn. 145, 149, 448 A.2d 829 (1982). Several months ago we invoked this well established practice in refusing to review an appellant's due process claim made under the Connecticut constitution. *Hayes v. Smith*, 194 Conn. 52, 66, 480 A.2d 425 (1984). None of these circumstances even approaches this suggested "claim" under the Connecticut constitution in this case for the simple reason no such "claim" has been made, briefed, or argued before us. It is only now, some time after the decision in this case was released on October 2, 1984, that the majority is "amending" its opinion apparently to place its resolution of the summation issue on both federal and state constitutional grounds. As already pointed out, the state constitutional ground has never even been presented to this court.

There can be no question about a state court's independent, responsibility for its state constitutional law. Recently the United States Supreme Court reiterated: "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Michigan v. Long*, U.S. , 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983), quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940). The statement that independent interpretation of state constitutional provisions is now well established does not require citation of authority. On the other hand, the determination by the majority that our state constitution has been violated without any such claim having been made not only subserves our well established appellate practice, but also in this case impermissibly exceeds any recognized right of independent interpretation of our state constitution.

In view of the fact that the majority has now amended its opinion, I maintain the position that this defendant's right to a fair trial was not violated under either the federal or the Connecticut constitution.